



The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES



Thomas S. Burack, Commissioner

March 14, 2007

Representative James G. Phinizy, Chairman
Environment and Agriculture Committee
Legislative Office Building, Room 303
Concord, NH 03301

Re: HB 879-FN, An act relative to establishing a conservation agent program within the department of environmental services

Dear Chairman Phinizy and Members of the Committee:

Thank you for the opportunity to comment on HB 879-FN, relative to establishing a conservation agent program within the Department of Environmental Services. HB 879 would require the Department to require a permit holder to hire a "qualified natural resource professional" to inspect projects and file a "permit compliance report" and, if appropriate, interim inspection reports, as well as to report "suspected violations" under RSA 485-A:17 relative to alteration of terrain, RSA 482-A relative to dredge and fill in wetlands, and RSA 483-B relative to shoreland protection. The Department believes greater oversight of such permitted activities is warranted in many instances, but has concerns about the bill as drafted.

Currently, permit holders are legally responsible for ensuring compliance with all permit terms and conditions. In most programs, though, due to limited resources the Department is not able to inspect all sites for which permits are granted. Since this is known in the regulated community, it is possible that permit holders will make a business decision to cut corners based on the small likelihood of having violations discovered. The Department thus supports having some mechanism, such as self-certification of compliance, that would result in the permit holder taking greater responsibility for ensuring compliance. The Department believes that an effective self-certification program would include two key components: (1) certification by a third-party professional would not be required on every project, especially not small projects with limited impacts; and (2) the Department would have authority to more closely align the type of professional who must certify with the type of project/site involved.

HB 879 does not confer the flexibility that is needed on either of these components. The bill requires third-party certification for all permits issued under the statutes included in the bill, and does not allow any discretion for the Department to exempt some projects from the requirement for third-party certification. Also, the bill defines "qualified natural resource professional" quite broadly, and does not give the Department the authority to require a particular kind of professional for any given permit or site. For instance, a professional engineer may not be sufficiently schooled in erosion control techniques to be the person who should be monitoring a difficult site (e.g., a site with steep slopes or erodible soils or that is in close proximity to a sensitive receptor) -- but under the bill as drafted, the Department would not have the authority to require the permit holder to hire an individual who has been certified as an erosion and sediment control specialist for that site.

Also, the inclusion in the bill of "permits issued under RSA 483-B:6" (page 3, line 15) has the effect of duplicating the requirement found elsewhere in the bill for permits under RSA 482-A (wetlands) and RSA 485-A:17 (alteration of terrain), as well as adding the reporting requirement for permits issued under RSA 155-E (local regulation of excavations) and permits issued under RSA 485-A:29 (subdivisions and septic systems). It is unclear what effect the inclusion of RSA 155-E would have, as this statute is implemented exclusively at the local level. As for RSA 485-A:29, the Department already inspects all

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septic systems prior to approving them for operation, and the Department's approval of a subdivision simply means that the proposed lots have been demonstrated to meet current requirements for lot size and loading; no land-alteration activity is authorized by such permits.¹

Finally, the Department is concerned about adding explicit authority to the three statutes identified in the bill but not to other statutory permitting programs. That is, the Department believes it already has adequate authority under its statutory permitting and rulemaking authority for the wetlands and alteration of terrain programs to require permit holders to certify (or hire an appropriate person to certify) that permit requirements have been met,² and in fact has been considering this option for those programs. Adding explicit authority to these programs may call into question the Department's ability to require compliance certifications under other programs that do not have explicit statutory authority added to them, even though they also confer broad statutory permitting and/or rulemaking authority (*see, e.g.*, RSA 149-M relative to solid waste management,³ RSA 146-C relative to underground petroleum storage facilities⁴).

In sum, the Department believes that a program of self-certification of compliance with third-party certification for appropriate sites could already be implemented with existing authority in the wetlands and alteration of terrain programs (among others), and that implementing such a program through rulemaking would allow greater flexibility than HB 879 currently provides. However, the Department is ready to work with any subcommittee or study committee that may be created to examine these issues in greater detail.

Thank you for your consideration of these comments. If you have any questions, please contact Michael Walls, Assistant Commissioner, at 271-8806 or mwalls@des.state.nh.us; Gretchen Hamel, Legal Unit Administrator, at 271-3137 or ghamel@des.state.nh.us; or Rene Pelletier, Water Division Assistant Director, at 271-2951 or rpelletier@des.state.nh.us.

Sincerely,



Thomas S. Burack
Commissioner

cc: Representative Thomas Fargo
Representative Larry Brown
Representative David Borden
Representative Judith Spang
Representative Frank Tupper
Senator Iris Estabrook

¹ If RSA 483-B:6, I-a is enacted as proposed by HB 857 (relative to permitting responsibilities under the comprehensive shoreland protection act), then the reference would make more sense since proposed paragraph I-a would require prior written approval from the Department for properties needing a variance, waiver, *etc.*

² RSA 485-A:17, I states, in part, "[t]he department shall have full authority to establish the terms and conditions under which any permit issued may be exercised, giving due consideration to the circumstances involved and the purposes of this chapter, and to adopt such rules as are reasonably related to the efficient administration of this section, and the purposes of this chapter." RSA 482-A:11, I provides "[t]he commissioner shall adopt reasonable rules, pursuant to the rulemaking provisions of RSA 541-A, to implement the purposes of this chapter."

³ RSA 149-M:7, III confers authority on the commissioner to adopt rules relative to the "[a]dministration of a permit system, including the terms and conditions under which the department shall issue, modify, suspend, revoke, deny, approve, or transfer permits required by this chapter."

⁴ RSA 146-C:9, II requires the commissioner to adopt rules relative to "[p]rocedures, forms, and criteria for issuing and renewing permits, as authorized by RSA 146-C:4." RSA 146-C:4, I provides in part "[n]o person shall own or operate an underground storage facility in this state without a permit issued by the department."